United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7173

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

MICHAEL McSWEENEY,

Plaintiff-Appellant,

—against—

M. J. RUDOLPH CO., INC., M. J. RUDOLPH CORP., YAMASHITA SHINNIHON LINE and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF SUBMITTED ON BEHALF OF PLAINTIFF-APPELLANT

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Statement

The Plaintiff-Appellant appeals from the judgment dated March 26, 1976 entered in the District Court for the Southern District of New York dismissing on motion, the complaints as to the Defendants Yamashita Shinnihon Line and International Terminal Operating Co., Inc. and

dismissing on motion the negligence claim as to the Defendants M. J. Rudolph Co., Inc. and M. J. Rudolph Corp. and the jury's verdict on the question of unseaworthiness in favor of the Defendants-Respondents M. J. Rudolph Co., Inc. and M. J. Rudolph Corp. and against the Plaintiff-Appellant.

The action is one to recover of the defendants damages for personal injuries suffered by Michael McSweeney on November 14, 1970 about 8:15 A.M. by reason of (1) negligence and (2) unseaworthiness of the vessels involved in the case. At the time of the occurrence, Mr. McSweeney was employed by the M. J. Rudolph Co., Inc. as an Oiler on a floating crane, known as the "R-5" which was owned by the Defendant M. J. Rudolph Corp. The Plaintiff-Appellant, age 38 was employed for a period of eight (8) years, either as an operating engineer on floating cranes of the employer or as an oiler. It was in the latter capacity that he was working when he suffered his accident.

The Defendants Rudolph own and operate 5 floating cranes which are known as the R-1, R-4, R-5, R-6 and R-12. Three are operated by diesel power and two by steam power. They are of different lifting capacities (pp. 280, 281 of Appendix). These floating cranes are affixed to floating barges 100 feet long and about 38 feet wide. The particular floating crane involved in this case is the R-5 which was powered by a diesel engine. It was in navigable waters off Pier 6, Brooklyn, New York at the time.

The crane itself is similar to those seen on the streets of New York City construction sites, except that it is permanently affixed to the floating barge. The crane housing revolves on a circular track, making a complete 360 degree movement; it has a boom of 90 feet including a

"gooseneck" jib. The operator sits in a cab about 40 feet aboard the deck and by means of levers is able to swing the crane in a complete circle; he can raise and lower the boom; he can hold the boom in a fixed position while raising or lowering the load. There are three drums in the engine room around which are wound one inch steel cables which permit the operator or engineer to operate the crane and its boom in the various ways to make it a lifting apparatus to load and unload vessels of heavy cargo (p. 25). At the end of the boom and suspended from the hook at the end of the cable is a block in the nature of a pulley.

On November 13, 1970 the Plaintiff-Appellant was working aboard the R-6 as an engineer operating the crane located near 21st Street, Brooklyn. On the day of his accident, the Plaintiff-Appellant reported to the R-5 at Pier 6 of the Port Authority at Brooklyn, New York after receiving telephone instructions from Mr. Arthur Rudolph, the then president of the Rudolph Corporation on the evening of November 13th. The R-6 and the R-5 were separated by many miles on November 13 and November 14, 1970, but both were in navigable waters of Brooklyn, New York.

Photographs of the R-5 were offered in evidence as Exhibits 1 and 2 at pages 26 and 27 of the Appendix. A photograph of the R-6 was offered in evidence as Plaintiff's exhibit 3 at pages 27, 28 of the Appendix.

The duties of the Plaintiff were to oil, grease, fuel the crane, handle lines, put out lights when the crane is towed at night, to watch that the floating crane did no strike or hit other vessels it was to load or unload (p. 22). It was in this posture that the Plaintiff brought a Seaman's complaint under the Jones Act against his employer (p. 4a) which were the Defendants Rudolph,

charging them with negligence. A charge of unseaworthiness was included in the complaint in that the Defendants Rudolph failed to furnish the Plaintiff with a seaworthy vessel; that the Defendants failed to furnish a sufficient number of competent co-employees and to furnish him with reasonably safe and seaworthy tools, appliances and gear and to keep the same in good and working condition (p. 6a).

A second cause of action was lodged against the Defendant Rudolph and the Defendant Yamashita Shinnihon Line (Previously Kawasaki-Kisen-Kasha, Ltd. prior to stipulation changing the name of the Defendant, See Docket Entry Nov. 3, 1972 and Order of Ryan, J. p. 2a) under the general maritime law. These defendants were charged with failing to provide the Plaintiff with a safe place to work and with seaworthy appliances and equipment for the Container-Cargo-Loading Operation underway (p. 12a).

A third cause of action in negligence was charged under the General Maritime law against the Defendant ITO (International Terminal Operating Co.) whose Marine Superintendent cursed, swore and threatened the Plaintiff because of the delay in changing over the two-part block to a four-part block on the R-5 on the morning of November 14, 1970 shortly before 8 o'clock in order to lift the 25 ton containers from the pier to the YAMAWAKA MARU. Negligence is also claimed against ITO and Rudolphs in failing to assist the Plaintiff in changing over the 1000 pound block of the R-5, although assistance had been offered by one of the ITO managerial employees (56-59).

The Four Part Block

On November 13, 1970 which was the day before his accident, the Plaintiff was working aboard the R-6 of his employer Rudolph at 21st Street, Brooklyn as the engineer. That evening he received telephone instructions from Mr. Arthur Rudolph, the President of the company to report the following morning as an oiler aboard the R-5 at Pier 6 in Brooklyn (p. 31). The R-6 is similar to the R-5 except that it is two years newer (p. 27).

The Plaintiff arrived on the morning of November 14, 1970 at about 7:30 A.M. (p. 31) which was a clear, calm day (p. 32). He went aboard the R-5, changed his clothes, oiled and greased the machinery and engine and started to build up air so that the crane could commence work at 8 o'clock. Shortly thereafter, Mr. McSweeney noticed a trailer truck with the emblem of ITO thereon, pull into the pier (p. 33). Going over to the trailer truck, the Plaintiff noticed that there was a van or container 40 feet in length containing a tag which gave its destination as the YAMAWAKA MARU and weight of 50,000 pounds (p. 34). He also observed that the R-5 was equipped with a two-part block which consisted of two steel plates with a sheave or wheel in between in the nature of a pulley. He explained that a single cable goes in on one side around the wheel and comes out on the other side and that is why it is referred to as a two-part block, with a certain lifting capacity (p. 35). It has a greater lifting capacity than a single cable, without a block, as the Court pointed out, the weight is spread over the cable going in and the part coming out. Mr. McSweeney stated that he is familiar with the lifting capacity of a two-part block and it is 36,000 pounds or 18 tons. The witness stated that he had worked on the R-5 some 5 years previous (p. 36).

Mr. McSweeney told the ITO pier Superintendent, Mr. Joseph Maguilo, who is known as "Joe Chuck" that the two part block was insufficient to lift the 50,000 pound containers, (p. 37) and thereupon Joe Chuck started to rant and rave, using foul and abusive language and started waving his fists at him in a threatening like manner that the Plaintiff thought he was going to hit him (p. 38). Joe Chuck accused Mr. McSweeney of having all the f...ing day before to change the rigging on the crane to lift the containers and that he was going to call Mr. Rudolph to get him fired. In answer to the Court's question if Joe Chuck had his fist in his face, Mr. McSweeney replied that "we were face-to-face and that Joe Chuck was hollering and that he did not know what it was all about as he had not been there the day before." The witness stated that Joe Chuck complained that he had done nothing the day before (it had rained) and that he had all day to get help to change the rigging. Mr. McSweeney asked Mr. Joe Chuck for help and he told him (p. 41) to change the f...ing block himself because he had four or five hours at the pier yesterday and he could have done it and he (Joe Chuck) would have supplied the help because he had men around to help (p. 42).

In response to the Court's inquiry to clarify the talk between himself and Joe Chuck, Mr. McSweeney repeated that Joe Chuck stated that he, McSweeney, had four or five hours the previous day to change the block and that he had men he could have given to help McSweeney because they weren't working because of the inclement weather, they weren't working the ship (p. 43).

The Plaintiff testified that he saw four men on top of the container on the trailer-truck who grabbed the hooks suspended from the block of the crane and they were going to hook up the container at the four corners (p. 43). Joe Chuck accused the Plaintiff while holler-

ing at him of not having the crane ready to work at 8 o'clock in the morning and now that the weather was Okay to work, that McSweeney was holding him up and these men of ITO were there and that he had to pay them (p. 44). Joe Chuck mentioned that he had a gang of men on the ship, waiting the arrival of the R-5 alongside the YAMAWAKA MARU and that the Plaintiff was holding him up. The Japanese vessel was 50 to 75 feet away and could be seen from the R-5. It was 500 feet long with a beam of 60 feet. Mr. McSweeney testified that in anticipation of changing over to the four-part block, he looked around for a tag line to attach it (p. 45).

In response to the Court's questions, Mr. McSweeney testified that the four-part block had to be used because the two-part block could not lift the containers. The four-part block was laying on the deck all this time (p. 46). To accomplish the change-over to the four-part block, the four-part block has to be picked off the deck with the two-part block suspended from the hook of the cable extending down from the boom, swing it over to the pier, lower the boom (which is 90 feet) so that the four-part block is landed properly on the pier at a certain distance from the boom so as to enable the cables to be reeved through in four parts and give more capacity (p. 47).

In answer to the Court's question, Mr. McSweeney testified that in changing over to a four-part block "we always have help". He said that the engineer on the R-5 lowered the two part block, which was on the crane when the Plaintiff came aboard that morning, to the place on the deck where the four-part block was laying (p. 48) and that he, McSweeney, then hooked the hook of the two-part block on to the four-part block and the engineer hoisted it straight up to the tip of the boom, swung it over the dock and proceeded to boom down, so that

it would rest eventually on the pier; when the block got to a position or about 5 to 6 feet above the surface of the pier he put his hands on the hook of the four-part block (p. 49). He put his hands on the hook of the four-part block he stated, to guide it to an on-edge position with the hook facing the crane, otherwise it would be impossible to reeve the block without having it (the cable) come out all twisted up. When the engineer boomed the four-part block 5 to 6 feet above the pier, he stopped it, at which point the Plaintiff put his hands on it. Suddenly, the block twisted and lurched forward to the left, causing him to have a severe pain and knife-like pain in the back, and he fell over on to the pier (p. 50).

The four-part block weighed approximately 1,000 pounds (p. 79) although the witness James Rudolph testified that it weighed between 1,000, 1,500, 2,000 pounds (p. 456).

Following the occurrence in which the Plaintiff suffered a twisting of his back, when the four-part block lurched forward and to the left, he was assisted by men on the pier, including Joe Chuck who grabbed him by the belt while the others supported his shoulders and feet and then placed him on a pallet (p. 60). He was next removed to Long Island College Hospital where he was given emergency treatment and then was taken to his home in New Jersey by Mr. James Rudolph, Vice President of the defendant corporations. Subsequently Mr. McSweeney was examined and treated by a Dr. Gudelis (p. 66) and later by a Dr. Cook who referred him to Overlook Hospital where the Plaintiff remained 10 days in traction. All told, the Plaintiff lost 16 weeks from work with a loss in wages of $7,500.00 (p. 75). The diagnosis of his injuries included a severe sprain of the lower black, with a disk protrusion causing a pressure on the nerve roots.

POINT I

The Defendants Rudolph, Yamashita Shinnihon Line and ITO were negligent in duties owed to the Plaintiff and the dismissal of the actions without submitting the same to the jury was error.

The Plaintiff testified that on the day prior to the date of his accident on November 14, 1970, he was working as an engineer on the R-6 for his employer in navigable waters near 21st Street, Brooklyn. He was ordered that evening by Mr. Arthur Rudolph, Sr., President of the Rudolph Corporation to report the next morning to work aboard the R-5 located at Pier 6 in navigable waters in Brooklyn. When he reported for work about 7:30 A.M. he was not knowledgeable as to the condition of the floating vessel R-5 with respect to its appurtenances and equipment. He was not knowledgeable at that moment as to what the R-5 was required to do that day, by way of lifting cargo.

On the other hand, all three defendants were knowledgeable as to these facts and with this knowledge, developed the duties which they owed to the Plaintiff. The failure to fulfill these duties, in a reasonable manner constitutes the claim of negligence which should have been submitted to the jury under a proper charge. The dismissal of the counts of negligence as to these Defendants constitutes error for which the judgment should be reversed.

What is the knowledge possessed by these Defendants and which was not possessed by the Plaintiff on the morning of November 14, 1970 shortly before 8 A.M.? To begin with, the International Terminal Operating Company had a contract with the defendant Yamashita Shinnihon Line to load its vessel the "YAMAWAKA MARU" with general cargo, unboxed automobiles, some heavy lifts, such

as machinery and containers (pp. 202-203). In addition to this contract, which would show the weights of the cargo to be lifted, there was a stowage plan, Plaintiff's exhibit in evidence No. 6 (p. 204). This stowage plan is prepared jointly by the ship's officers and the Port Captain (p. 206). The ship's officers of course refer to the officers of the "YAMAWAKA MARU". The Port Captain represents the ship and on the morning of November 14, 1970 it was either Mr. James Burt or Mr. Sal Agro or both (p. 207). This information was received without opposition from counsel from the lips of Mr. Joseph Maguilo, more familiarly known as Joe Chuck, the Marine Superintendent of ITO in whose employ he was for 21 years.

So far we have two Defendants with knowledge as to the cargo and weights thereof to be lifted aboard the "YAMAWAKA MARU" by the Rudolph floating crane R-5, namely the defendant Yamashita Shinnihon Line and the defendant ITO. It would be discussed with the Ship's officers (p. 246).

The floating crane R-5 had been ordered and leased by the defendant Yamashita Shinnhon Line (pp. 437, 438) according to Mr. James Rudolph. It had been towed by a tug from Port Newark and brought to Pier 6 in Brooklyn and it was towed unmanned, without a crew (p. 437) Mr. Rudolph testified that the R-5 had been rigged with a two part block which had a maximum lifting capacity of 36,000 pounds or 18 tons and that the defendant Yamashita Shinnihon Line informed the defendants Rudolph that the maximum lift would be 30,000 pounds or 15 tons, and that is why the R-5 was brought to Pier 6 from Port Newark with a 2 part block. Mr. Rudolph testified that he would not allow the R-5 to make the 50,000 lift with the 2 part block (p. 439).

It should be borne in mind that the R-5 was towed from Port Newark and delivered during the night to

Pier 6, Brooklyn. No one from the Rudolph Company was present when the R-5 was delivered (p. 288) Mr. Rudolph stated that orders to commence work on November 13th, 1970 would come from Mr. Sal Agro of the Texas Transport & Terminal Port Co. which was the agent for the defendant Yamashita Shinnihon Line. Mr. Agro had his office at Pier 6 in Brooklyn (pp. 290-291) Mr. Rudolph was definite in his statement that the customer, the Defendant Yamashita Shinnihon Line would order the starting time (p. 289).

Mr. Rudolph stated that the Rudolph Company becomes informed as to the nature or weight or size of the cargo to be hoisted aboard a vessel, when the crane is ordered (p. 294) and this might have been a week before. When the Rudolph Company received the order to furnish or deliver a crane with a lifting capacity of 18 tons, its selected the R-5 (p. 295). Here we have the defendants Rudolph with knowledge that the crane was to lift a maximum of 18 tons. The Court first allows the answer to stand with the comment: "I will allow the answer to stand. Obviously a crane was ordered and Rudolph delivered the R-5". A few lines later, the Court struck out the "lifting Capacity of 18 short tons. No foundation for that. Strike out the answer" (p. 295). However, when Mr. Rudolph later in the case took the stand and testified for the Defendants Rudolph, he stated that on the 13th (of November) the crane was rigged with two part block which would be 18 ton, yes" (p. 438). Mr. Rudolph testified that he did not know why the change over from a two part block to a four part block was not done on November 13th, the day before the occurrence (p. 452). Further he stated that no one from the Rudolph companies visited Pier 6 or the "farm" area of pier 6 to see the weights and containers that were to be put aboard. He stated that Mr. McSweeney was on the R-6

the day before the accident at 21st Street which is an ITO Pier (p. 453). Under the circumstances, the failure of the defendants to inform themselves in advance of November 14th, 1970 that the weights of the containers to be lifted exceeded the lifting capacity of the crane R-5 constituted negligence. The R-5 came to Pier 6 unmanned. No one in the employ of the Defendants Rudolph was on her. No one made any inspection to determine what equipment was aboard the R-5. There was no supervisory person of the Rudolph Companies present to help the Plaintiff to make the changeover to the four part block.

Based on the superior knowledge the three defendants had with respect to the obligations and requirements of the R-5 with respect to its lifting capacity, their failure to arrange for the change over of the 4 part block was negligence. The failure of the defendants Rudolph to be informed of the containers weighing 50,000 pounds that came into the pier on the ITO trailer trucks on the morning of November 14, 1970 is negligence. The Defendants Rudolph, as the owners and operators of floating cranes, cannot merely close their eyes after their cranes are ordered without probing into the requirements to which the crane will be subjected. This is what it did here. It sent a crane from Port Newark, unmanned, which was towed in the night to Pier 6 Brooklyn without an inspection of the vessel to determine her appurtenances, appliances and equipment and its capability to do the one job for which she was hired, namely to lift heavy cargo, some weighing 50,000 pounds.

Giving the defendants Rudolph the benefit that it had no knowledge of the weights to be lifted (which is not likely) and pin the mark of negligence on it for failing to investigate and learn of these weights, the Jury may have well concluded that it did not believe this story

and that the Defendants Rudolph well knew the weights to be lifted and did nothing about it. Certainly it was no secret. The Bill of Lading showed the weights; the tags on the containers showed the weights to be 50,000 pounds, the contract between the stevedore ITO, the Yamashita Shinnihon Line together with the stowage chart and other documents offered in evidence both from the ITO and the defendant shipowner revealed these weights.

Why then didn't these three defendants do something about this problem instead of burdening an oiler by the name of Michael McSweeney with the task of making certain that overweight lifts were not taken up by the R-5? Why did not these three defendants confer with each other as claimed they do and find out the weights to be lifted? A 40 foot container is not something that can be hidden, particularly when carried on a trailer of the defendant ITO which came on the pier that morning and was spotted by the Plaintiff.

These are fact questions that should have been submitted to the jury. The Court acted improvidently in taking these questions away from the jury. And it acted unwisely in relying on authorities whose facts do not compare with those in this appendix. Based on the possession of knowledge alone, the three defendants were in a better position to be informed and avoid the hazards to which the plaintiff was subjected. He was not warned or alerted to the dangers which would confront him. It was error to dismiss the negligence counts against these defendants, a prima facie case having been made. That is all a Plaintiff must do to avoid a summary dismissal of his complaint and in the case at bar, the Plaintiff made out a convincing case of callous negligence against all three defendants, particularly when the proof submitted demonstrated that the general practice is to send a crane fully equipped and capable of fulfilling its mis-

sion. This the R-5 did not do. None of them made an inspection of its equipment and gear but put the blame on a single worker, with no prior knowledge of the problems to be met until he reported for work on the morning of his accident. The judgment should be reversed.

POINT II

The failure of the Defendants ITO, Yamashita Shinnihon Line and the Defendants Rudolph to provide the Plaintiff with a safe place to work with sufficient complement of manpower and with adequate equipment and the appurtenances was negligence and the dismissal of the case without submitting the same to the jury was error.

Shortly after his arrival on the job site at Pier 6, Brooklyn, the Plaintiff testified that he changed his clothes, greased and oiled the machinery and engines of the R-5. About 8 o'clock he observed a trailer truck bearing the emblem of the defendant ITO backing into the pier. Further investigation by Mr. McSweeney disclosed that the container, 40 foot in length aboard the trailer weighed 50,000 pounds and that the tag bore the destination of the YAMAWAKA MARU. He also observed that the R-5 was equipped with a two part block (p. 34). The two part block, Mr. McSweeney knew had a lifting capacity of 36,000 pounds or 18 tons (p. 36).

The Plaintiff informed the Marine Superintendent of the Defendant ITO, Mr. Joseph Maguilo, that the R-5 was equipped with a two part block and his belief that it was insufficient to lift these containers. Mr. McSweeney says that he knew Mr. Maguilo to be known as "Joe Chuck" the Marine Superintendent for the Defendant ITO

and that he wore a helmet with the name of "Joe Chuck" ITO imprinted on it. The latter is the Marine Superintendent of the Defendant ITO having been in its employ for 21 years. He has an office on Pier 6 (p. 193).

The Plaintiff testified that he was subjected to abuse, threats and attempts to strike him when he informed Mr. Maguilo of the inability to lift the containers, that he, McSweeney, had done nothing all day before when the weather was inclement and the ship was not being worked. Actually, Mr. McSweeney had not been on Pier 6 the day before, having worked as the engineer on the R-6 at 21st Street, Brooklyn. The Plaintiff was completely ignorant of the conditions that Mr. Maguilo referred to on the day before (p. 41).

When Mr. McSweeney asked Mr. Maguilo for help he told him to change the f...ing block himself, because he claimed McSweeney had 4 or 5 hours the day before to make the changeover and that he Maguilo had men available and could have supplied the help because the ship was not being worked the day before (p. 42). Mr. Maguilo complained of the cost of paying his men who were idle by reason of the loading operations being held up by the failure of the R-5 to be ready, including the four men that were standing atop of the container waiting to be lifted and the gang of men Maguilo had on the ship, the YAMAWAKA MARU (p. 45).

Mr. Rudolph testified that he knew Mr. Joe Chuck for years and that he was the Pier Superintendent of the defendant ITO. Mr. Rudolph in answer to a question as to whether Mr. Joe Chuck tells the crane crew where to load with respect to hatches, he replied he may not do it personally, but he is in charge of it. He is the overall boss of the pier and he has a hatch foreman and ship foreman under him. Mr. Randolph further testi-

fied that the crew of the floating rigs of the Defendants Rudolph are required to take orders from the Pier Superintendent, particularly when it is pointed out that the "lifting exceeds the capacity they are rigged for. They have the authority to go ahead and re-rig and make it known to the office at a later date" (p. 441). An additional charge could be made for the re-rigging (p. 441).

Under the circumstances the refusal of the defendant ITO through its Marine Superintendent Joe Chuck to furnish help to the plaintiff in making the change over to a four part block was negligence. This is particularly so in view of the fact that the Plaintiff testified that in hollering at the Plaintiff, Mr. Maguilo had stated that he had men available on the day before to help as the ship was not being worked because of the rainy weather.

The gist of what occurred was that the Marine Superintendent was getting "even" with the Plaintiff in the mistaken belief that he was there the day before on Pier 6, goofed off and did nothing in the 4 or 5 hours that were available. This coupled with the abuse and threats made by the Pier Superintendent constituted negligence of a deliberate and callous nature. The pier superintendent of ITO is a very important person, charged with the serious business of getting ocean going liners and freighters loaded and unloaded. Hence, his actions and conduct carries great weight and as Mr. Rudolph testified the Marine Superintendent has authority to tell Mr. McSweeney to change from a two part block to a four part block (pp. 439, 440).

Compounding the failure of the Pier Superintendent of the defendant ITO to furnish help, out of mere spite and anger, to the Plaintiff was the offer of help by Joe Geller, known as Joe the Harbor Master, who heard the abusive language and threats made to the Plaintiff by Joe Chuck

and who told Mr. McSweeney to pay no attention to him (p. 51).

Joe the Harbor Master is an employee of ITO according to the testimony of the Plaintiff who stated that he wore a hard hat with the emblem of ITO on it (p. 52). The failure of the defendant ITO through its Marine Superintendent to assist the Plaintiff in changing the block after ordering him to make the change (p. 125) put the Plaintiff in a position of danger, as the event that later took place proved. Mr. McSweeney could not disobey the Marine Superintendent who was the boss of the pier and in charge and from whom he had to take orders (p. 125). Mr. Rudolph confirmed the status of Mr. Maguilo, the Marine Superintendent as being the overall boss on the pier in his testimony (p. 436). The authority of the Marine Superintendent is clearly stated by the Plaintiff who testified that when the Superintendent orders him to make a lift but the block is insufficient he then orders him to change the block and he has done that (p. 168).

Mr. Rudolph testified that in many instances in his Port Newark yard, longshoremen employed by Rudolph come over and lend a hand in changing the block and this would be true if two men came over (p. 446).

The promise of help made to the plaintiff by Joe the Harbor Master on which the Plaintiff relied came to naught after the Marine Superintendent commenced to holler and threaten and curse the Plaintiff out. Mr. McSweeney testified that Joe the Harbor Master was present on the pier when Joe Chuck was hollering at him (p. 62). Nevertheless, when Mr. McSweeney waited until the 4 part block had been boomed down to a height of 5 or 6 feet above the surface of the pier to place his hands on it to guide it to the pier, he though that Joe

the Harbor Master was there to help him, at least he assumed that he was behind him.

When the Marine Superintendent refused to help him, Mr. McSweeney in reply to a question as to why he did not telephone the Rudolph office for help, he replied that the office is not open at 8 A.M. (p. 118). Mr. McSweeney further testified that there was no place at 8 o'clock in the morning where he could reach the Rudolph Companies (p. 118).

He stated that Joe the Harbor Master had told him that he was going to help him and that was repeated in reply to the Court's question (p. 121). He stated that Mr. Rudolph would not know where the tag line was and he tried to follow the orders of the Marine Superintendent in re-rigging the four part block, under the pressure of abusive and obscene talk and threats and the charge that his failure to have the crane ready was holding up the work of many longshoremen on the container ready to hook it up and the gang of 20 men on the ship.

Although the Plaintiff testified that he looked for a tag line to attach it to the four part block to help position it on the ground, the Court struck out what descriptive words the witness used that followed (p. 46). The defendant Rudolph's attorney inquired of the Plaintiff if he had looked to see if there was a tag line on the vessel, on the deck of the vessel and Mr. McSweeney answered that he did (p. 86). He stated that he always used a tag line when he was doing this particular type of job, when he had one (p. 87) and this tag line was to guide it (p. 91). Mr. McSweeney testified that there was no tag line or rope that could be used as a tag line on the barge (p. 92). In answer to a question as to the search he made to locate a tag line, Mr. McSweeney stated that there was none on the deck and none in the tool

room and none under the deck as the hatches were sealed (pp. 92, 93). On cross examination the witness stated that there was no rope in the cabin and no rope on the pier in the vicinity of the R-5 (p. 95).

Further cross examination of the Plaintiff by the attorney for the defendant Rudolph revealed that in changing the rigging of a block weighing 1000 pounds he always had the assistance of longshoremen who would also help in putting the cable through the block (pp. 108, 109). Cross examination of the Plaintiff by the attorney for the Defendant Yamashita Shinnihon Line brought out the same fact as brought out by the attorney for Rudolph, that there was no rope or tag line on the R-5 (p. 110). Mr. McSweeney in reply to questions of counsel for the Japanese vessel stated that he asked Joe Chuck for help and that he refused to give him help (p. 111).

Mr. McSweeney was questioned by the attorney for the defendant Yamashita Shinnihon Line as to why he did not call Mr. Rudolph on the telephone and say he needed more help and the witness replied that there was no one in the office at 8 o'clock in the morning (pp. 112, 113). Mr. McSweeney stated that normally the crane is rigged up for four part containers but it was not rigged up for four part containers on this particular day (p. 114). Mr. McSweeney testified during cross examination by the attorney for the Japanese vessel that changing the block is a three to four man operation (p. 118).

Counsel for the defendant Yamashita Shinnihon Line questioned the Plaintiff as to why he proceeded to change the rigging when there is no tag line and insufficient men to do the job and the Plaintiff replied that he had been promised help by the Harbor Master (p. 119). Of course, during the time that the questioning relates to, counsel for the YAMAWAKA MARU failed to include in his question

the important and violent episode of the Marine Superintendent Joe Chuck pressing the Plaintiff to get the job done and cursing him out in the bargain (p. 121).

The failure of the R-5 to have a tag line aboard can be explained by the fact that it was ordered there from Port Newark to Pier 6 the day before the accident, having been towed during the night and delivered during the night. It was unmanned and thus no attempt was made to see if the R-5 was properly equipped. Mr. Rudolph testified that he visits the floating cranes from time to time but he does not have a recollection of having visited the pier on November 13 or November 14, 1970 and view the cargo that was to be placed aboard the YAMAWAKA MARU by the R-5 (p. 442). Mr. Rudolph in answer to the Court's questions testified that he visits the vessel whenever he can, but it is not a set time.

The proof is overwhelming that this business was being supervised in a very loose way. No regular inspections were made of the floating crane or its equipment and Mr. Rudolph testified that he visited the floating cranes whenever he could (p. 429) and that he has no recollection of what gear was on the R-5 on the morning of November 14, 1970 and did not make any record of what was on the vessel on November 14, 1970 (p. 437). He did not know when the Rudolph Company learned that the R-5 was insufficiently rigged to hoist the cargo of the Japanese vessel (p. 439).

All of the facts described in this brief up to this point, are pin-pointed by chapter and verse, the witness' name and the page number. These facts standing alone constitute a position, a prima facie case from which conclusions could be drawn. Against these facts as testified to by the plaintiff and others making up the plaintiff's case, were the facts presented by the defendants. Most

of the proof offered by the defendants came from depositions of the Plaintiff and the testimony offered by the Defendants Rudolph in the person of Mr. James Rudolph. Right then and there are facts which portray negligence or the absence of negligence. If such is the posture of the action then there are facts in dispute which should have been submitted to a jury for determination. Why wasn't it done? No one testified for the defendants Yamashita Shinnihon Line and no one testified for the defendant ITO other than the proof offered in the deposition of the witness Joseph Maguilo, familiarly known as Joe "Chuck".

The Trial Court in taking these issues from the Jury, particularly in a cause which was fairly hotly contested, committed a serious error which can only be retrieved by reversing the judgment and sending the case back to the Southern District for re-trial by a jury to which the Plaintiff as a seaman is entitled. The charge of negligence lays equally against each defendant. The Defendant ITO by the scandalous conduct of its Marine Superintendent was negligent to a callous degree. The oppression to which the Plaintiff was subjected reminds one of the treatment seamen received from the Master in the sailing ship days. He had no rights and that is why a seaman became a ward of the Admiralty Court.

The charge of negligence against the defendants Rudolph is clear and pervasive. It spread around. The Rudolphs with knowledge of the capacity of the R-5 sent it with a 2 part block to lift containers of 50,000 pounds. We should not for the moment forget that ship loading or unloading is a big, massive operation. The traffic in this business cannot be permitted to get so great that the details pertaining to the heart of this business can be pushed under the rug, namely the safe lifting capacity

of its cranes. Undoubtedly, the business in the New York and Port of Newark harbors is so intense, with the shortage of floating cranes that they can be dispatched at night, unmanned, without inspection as to equipment or appliances or appurtenances and then delivered to a pier of a customer who is then told, "go ahead the crane is yours".

Transportation companies do not do this in dispatching trucks in the city or over the road. At least the law requires inspections to keep their protection intact. But not so with floating cranes, for how else can you explain the utter disregard for safety in delivering an unmanned floating crane, towed during the night from Port Newark to a pier in Brooklyn for use before 8 o'clock in the morning? These were proper issues for a jury to decide and the trial court made a serious error in taking these issues from the jury. The judgment should be reversed as to all three defendants on the question of negligence.

This is particularly true when the record shows that the actions for negligence were dismissed before the defendants Rudolph presented their defense in the only action remaining, namely the one charging them with furnishing an unseaworthy ship. Here the testimony of Mr. Rudolph by itself would have made out a case of negligence when he admitted that he did not regularly visit the various floating cranes owned by his companies; that he did not know what equipment or lack of equipment was on the R-5 on the morning of November 14, 1970 and that no inspections on a regular basis were made to these vessels. These would be questions of fact for the jury to determine. Hindsight is one of the factors a trial judge should use in denying a motion for dismissal. It was not done on this case and the judgment should be reversed and a new trial ordered.

POINT III

Cumulative errors of Trial Court on admission or exclusion of evidence deprived Plaintiff of substantive proof in support of his cause and prejudiced it in eyes of jury.

The Trial Court continued to make rulings on the admission or exclusion of evidence that was damaging to the Plaintiff's case in two particulars. One, by sustaining objections that were made by Counsel and by sustaining objections of his own, but which were not made by Counsel, the Trial Court deprived the Plaintiff of valuable, positive and affirmative proof in the case of liability against the defendants, and Two, in the case of medical proof, deprived the Plaintiff of proof of his injuries, pain and suffering.

Apart from the substantive loss to which the Plaintiff was subjected by these erroneous rulings, the trial of the case, slowly, gradually and imperceptably took on a look that was damaging to the posture of the case in the eyes of the jury. The frequency of the adverse rulings could not help but consciously or unconsciously sway the thinking of the members of the jury into believing that the Plaintiff's case just did not ring true.

If this was not the reaction, it certainly put the Plaintiff and his Counsel on the defensive in the eyes of the jury, particularly where Counsel was obligated to be constantly aware of the need to preserve the records for review. The constant but respectful disagreement with the Trial Court's rulings on the admission of evidence did not put the jury in a receptive mood for the acceptance of any proof and this may account for its verdict at the end of the trial.

Of course, the above complaints need to be earmarked and supported and this will be attempted by showing what

proof was adduced in the depositions and what parts of said depositions were allowed into evidence.

The chief cause of this entire spectrum of error, was the fact that the Trial Court had a copy or original of the deposition in his hands and which he used to follow the questions of Counsel, when read by the attorney for the Plaintiff. If the witness answered the question by saying "I am not sure" or "possibly" or "maybe" or "I do not recall", the Trial Court struck out the question and forbade the reading of the answer. When this method of exclusion continued over and over again, Counsel respectfully inquired of the Court if the ruling was based on the unread answer, the Court stated that such an answer as "maybe" or "possibly" or "I don't recall" is no answer at all and then struck out the question, and forbade the reading of the answer. This was because the Court had a copy of the deposition in front of it and knew what the answer of the witness would be and acted upon it instantaneously, in many cases when no objection by opposing counsel was interposed.

It was difficult to believe that this type of ruling was being made. All a witness or party had to do to prevent his answers from being part of the proof was to couch each answer with the word "perhaps" or "maybe" and this would automatically exclude the question and forbid the answer from being read. The absurdity of the rulings must have dawned on the Court, for ironically when such an answer was received from a question read by counsel for one of the defendants, the Court made no attempt to strike the question and forbid the answer. In this regard the Court was inconsistent and this was pointed out to his Honor. In some very few instances, the Court agreed with the logic of counsel for the Plaintiff that the rulings were incorrect and reversed itself. In one instant, the Court flattered counsel by remarking, "Sometimes you are correct, go ahead" (Page 290).

The net result of course was to do irreparable damage to the Plaintiff's cause which damage was never repaired as witness the Jury's verdict. It did not seem to dawn on the Court that some witnesses use the expression "maybe" or "possibly" or "I don't recall" as their manner of expression. It is as much an answer as "yes" or "no" are answers. The everyday use of these words in conversation and dialogue and description of events makes them completely acceptable. Of course the listener, in this case the jury, can attach just so much creditability to the user of these expressions or words as may be warranted in the premises, but it goes without saying that such words constitute answers. The Court's erroneous rulings that they are not became catastrophic in the damage to the Plaintiff's cause. Juries are known to follow a judge, particularly a Federal judge, almost blindly when the stage and props are properly set, as to his feelings or opinions and comments as to pieces of evidence and proof as the same comes down the escalator. This of course is said in a most complementary tone, for there are few persons in public life that are more creditable to the American scene than a Federal judge. Yet they make mistakes. And here are some of them:

In the case of the reading of the Deposition of Mr. Joseph Maguilo, which begins at page 191 of the Appendix, it is claimed that the Trial Court made error in the exclusion of evidence in refusing to allow the contract between the Defendant ITO and the Defendant Yamashita Shinnihon Line to be offered into evidence. Even though Counsel for the defendant parties did not object, the Trial Court took it on its own to get concessions from the attorneys for these defendants that there was a contract with the remarks:

> The Court: Well, with that stipulation, there is no need to put that contract in evidence.

> Mr. Corcoran: If your Honor please, there may be a necessity to put it in evidence to show the duties on the part of these respective parties as to what to do, and whether or not safety precautions are met, and hence I respectfully say . . . (page 205)
>
> The Court: You say may be. Now, have you looked at this exhibit before?
>
> Mr. Corcoran: No, your honor.
>
> The Court: Well then, you just hold on to that exhibit and we will let you look at it and see if there is any portion you need. In the meantime, it is stipulated that there was an agreement between the vessel and the stevedores to load the vessel. . . .
>
> The Court: All right. You may look at that over the lunch hour to see if there is anything contained in that which you need on this record.

Although the exhibit was marked Plaintiff exhibit 8 for identification it was never received in evidence and in the exigencies of the trial was all but forgotten by counsel. This particular claim of error may or may not have been preserved for review on appeal, but the fact remains the trial court circumscribed counsel unduly and helped dim the picture of creditability in the eyes of the jury. In any event the episode did not do the Plaintiff's cause any good.

The Court again denied the plaintiff the right to include in the record for review such portions of the depositions sought to be read by putting it off. When counsel stated that the testimony if granted would be out of context, the Court replied:

> The Court: All right. It's out of context. Go ahead. (p. 211)

We had a sample of the court's attitude right at the immediate opening of the trial. At page 2 of the Appendix in the robing room the Court announced that the cross claims of the respective defendants will be withdrawn from the jury and decided by the court if the need arise. This was stipulated to by counsel for the defendants.

The next thing the Court did on its own, without counsel for the defendants asking for it, was to grant an extra challenge to each defendant in addition to those granted under the rules. When counsel for the Plaintiff expressed his disagreement with the court's giving of an extra challenge when the cross claims were to be decided by the Court itself and not by the jury, the Court gave a reason that is not clear to this day:

> The Court: I know, but they have got to litigate the facts up there, and they may have jurors who view the facts differently in this case. (p. 2)

Although counsel pressed his point that by withdrawing the cross claims from the jury, there was no need for an extra challenge on this basis, the Court said:

> "Well, you make a good point. I nevertheless think their interests are not necessarily the same, and it is discretionary with the Court to grant extra challenges under Section 1870 of Title 28, and I am going to do it." (p. 3)

Although no harm came to the Plaintiff in the selection of the jury insofar as the ruling above is concerned, it nevertheless is an example of rulings that were to follow in the trial. Actually the Plaintiff did not use up his challenges (only two were used) and the Defendants are believed not to have exercised any of their challenges.

One of the claims of negligence is that the defendants and particularly the employer Rudolph failed to furnish sufficient help to the Plaintiff to make the change-over of the 1000 pound 4 part block. This claim is also made against the other defendants. In the case of the Defendant ITO, its Marine Superintendent refused to give the Plaintiff any help, although he stated that he was ready to give him help the day before the accident. The Marine Superintendent was in the mistaken notion that the Plaintiff was on the crew of the R-5 on the day previous when it rained and no one did any work—the ship was not worked. When the Plaintiff was chewed out by the Marine Superintendent in a violent and threatening way, another employee Joseph Geller, known as "Joe the Harbor Master" came over and told the Plaintiff not to pay any attention to the Marine Superintendent and offered to help the Plaintiff.

Although the Plaintiff identified Joe the Harbor Master clearly as a supervisory employee of the defendant ITO who wore a helmet with the name ITO imprinted thereon (51, 52) the Court dismissed the jurors for lunch and had counsel remain in the Court room for discussion referrable to Joe the Harbor Master. Counsel for the Plaintiff sought to show that the offer of help from Joe the Harbor Master came to naught when the Marine Superintendent of ITO cursed and threatened the Plaintiff, the Court refused to allow the conversation with Joe the Harbor Master, supportive of this claim (pp. 53-60). Subsequent proof offered by Mr. James Rudolph, when he took the stand confirmed that others engaged in loading and unloading operation help in changing the block, particularly in this case where the change was ordered by the Marine Superintendent of the defendant ITO. An additional reason would be the fact that the defendant Yamshita Shinnihon Line is a year round client of ITO which rent Pier 6 in Brooklyn on a year round basis. The moti-

vation to assist the Plaintiff under the circumstances would have been in the general interest of both defendants ITO and Yamashita and except for the spiteful, callous, positive negligence of the defendant ITO acting through its Marine Superintendent, help would have been forthcoming. Nevertheless the Court disallowed the conversation on this most important phase of the case under the principle of negligence. This was one of the conditions demanded by the court at page 57 where it said:

> The Court: We are talking now about negligence or unseaworthiness. We have got to come under one or two of these two—

The importance of this ruling when on cross examination the Plaintiff is asked by Counsel for the Defendant Yamashita why if he knew that he had no tag line and he didn't have sufficient help, he undertook to make the change-over of the block. Mr. McSweeney's answer that the Harbor Master offered to help him. This was stricken by the Court (p. 119). The Court and Counsel questioned the Plaintiff at length on cross examination as to why the change over was undertaken absent a tag line and sufficient help, until finally Mr. McSweeney stated that he had to take orders form the pier superintendent (p. 125). The defendant Yamashita sought to make much of the fact that the Plaintiff undertook this work without the required number of men to help and characterized it as "imprudent" and "unsafe" (pp. 121, 126). The Court in its lengthy questioning of Mr. McSweeney sought to establish that he knew that Joe the Harbor Master was not going to help him but Mr. McSweeney refused to agree with the Court's version and answered Counsel:

> "No, he was going to help me."

The Court's attitude persisted at Page 127 when in questioning the Plaintiff and the point was made that the Plaintiff did not see Joe the Harbor Master behind him although he assumed he was. When Mr. McSweeney testified that he takes orders from the Superintendent on the pier, the Court struck the answer and sustained objection to attempts to clarify what "orders" meant despite the fact that the Court at the bottom of page 162 suggested to counsel that he find out who his superior is, and how the pier runs and things of that kind (P. 162). The excessive taking over of examination by the Court was not warranted under the circumstances, and this was renewed at page 164 until Mr. McSweeney answers at Page 165 that the crane is hired out to somebody and if someone didn't tell the crew what to do it would do nothing and that is the superintendent who tells him (p. 166). The superintendent also tells him when to go to lunch and when to work overtime (p. 167, 168).

The liability of the Defendant Yamashita Shinnhon Line was offered through the testimony of Mr. Joseph Maguilo (Joe Chuck) pier superintendent of the defendant ITO who testified on deposition, that the stowage plan was made by the Ship's officers and the Port Captain, the latter being the employee of the Texas Transport Company which is the agent for the defendant Yamashita. Mr. Maguilo testified that ITO had authority to recommend changes in the stowage plan (p. 206-207). This authority of the defendant Yamashita to prepare and make up the stowage plan with its agent, the Port Captain and to make changes in said plan demonstrates the supervisory power the ship's officers have over the loading process. And it had this authority with respect to the change over of the 4 part block. The failure of the R-5 to come prepared to Pier 6 with a 4 part block, in view of the containers and their weights which were to be lifted, placed

an obligation on the defendant Yamashita Shinnihon Line which should have been submitted to the jury to resolve.

The court however thought this phase of the case irrelevant and ordered Counsel for the Plaintiff to get away from the stowage plan and its preparation and all that saying "That has nothing to do with this case in my opinion" (p. 210).

When counsel for the Plaintiff sought to make a record of the proof that was being barred, and asked the Court how the reporter would record the pages of the deposition that were being omitted, the Court replied:

> "Well, we will talk about that at another time." (p. 222)

Portions of Proof Barred by Court Because Answers Lack Certainty

The Court barred the attorney for the Plaintiff from reading question of the Marine Superintendent from his deposition as follows:

> "Q. Would that, say the delay of a half-hour, or an hour that this might take, or did take to make the changeover from a single to a double—"
>
> The Court: Hold on. The answer doesn't respond to the question at all, so I sustain the objection to reading the question.
>
> Mr. Corcoran: I don't follow your honor.
>
> The Court: Anything in the world is possible.
>
> Mr. Corcoran: That's what the witness said. (p. 253)

Although the Court interrupted Counsel and refused to allow him to finish the question, the reason given by the

court was the answer of the witness. The answer of Mr. Maguilo at Page 74 of his deposition was:

"A. It possibly could."

At page 260 of the Appendix, the following took place:

Q. Would they from time to time make inquiry from you or from somebody else, like a Port—"

The Court: Wait. Wait. Is there going to be anything to follow all of this up?

Mr. Corcoran: This is what's following—

The Court: On the next page he says "I don't recall."

Q. Would they from time to time make inquiry from you or somebody else, like a port captain, as to how things are going?

Although the answer in the transcript of the deposition of Mr. Maguilo was "Yes, they would" the Court sustained objection on the basis of uncertainty.

Again at page 261 the following occurred:

Q. In the course of your conversation,—

The Court: If you look at the answer Mr. Corcoran, that is not an answer. This is a speculative answer.

Mr. Corcoran: I respectfully submit your honor, that in language of this witness that it's for the jury to determine whether his answer is speculative or it is an affirmative answer.

The Court: I sustain the objection (actually no objection had been made to this question). (page 261)

The damage caused by the Court's ruling can be seen when this court is informed that the questions pertain to

conversations had with the Marine Superintendent of ITO and the ship's officers. Thus the question which was sought to be read at page 88 of the Deposition of Mr. Maguilo is as follows:

> Q. In the course of your conversation, either with the ship's officer or the port captain, did the subject matter of the delay caused by the changeover from the single block to the double block come into being? Did you have occasion to talk about that?
> A. I may have.

The attention of the Court is invited to page 263 of the Appendix where the following occurred:

> Q. I've got it now. When you were talking with Mr. McSweeney as to why the change from the single block to the double block—.
>
> The Court: Just a minute, Mr. Corcoran. Again we have two questions in a row where the answers are completely inconclusive of anything. The second one even more than the first.

At page 264:

> Mr. Corcoran: Do I understand your honor is sustaining objections where the witness says possibly, or may have been?
> The Court: Yes. Because that is speculative and that is not evidence for the jury to consider.
> Mr. Corcoran: I submit to your honor that it is. That is a way a person talks. And that is certainly for the jury, I think. But, I will abide by your Honor's ruling.
> The Court: All right.

Actually, the question sought to be read from 91 of the deposition of Mr. Magliulo was as follows:

Q. I got it now.

When you were talking with Mr. McSweeney as to why the Change from the single block to the double block was not made before, was Joe, the harbor master present there then?

A. He may have been.

The Court again utilized this type of ruling at pages 266-267 where the answer of the witness was

"I don't know if it was done that way but that would be the way."

After persuasive argument that the reply of the witness was a definitive answer, the Court relented and permitted the question to be asked and answered at page 268.

This is the only instance that can be recalled where the Court changed its position in allowing a question to be read that was followed by a so-called speculative answer. But, ironically, the Court resumes its same posture by striking out the question at page 268 of the Appendix which reads as follows:

Q. Have you seen it being changed? Have you observed it in your 21 years of experience?

A. I may have.

The Court: Strike out the question.

Mr. Corcoran: So that the record may reflect, your Honor, do I understand it is because he says, "I may have?"

The Court: Yes.

Mr. Corcoran: That doesn't constitute an answer?

The Court: That is a speculation as to whether he did or didn't. (p. 268)

Mr. Corcoran: All right. So the record is clear, that is all your Honor. (p. 269)

At page 313 the Court, however, used its unusual ruling inconsistently when Mr. Campbell for the Yamashita Shinninon Line asked this question.

> "Q. In addition to the entry as to who called us, would an entry in a log be made as to the maximum load to be put aboard the ship?
> "A. It may or may not".
>
> Mr. Corcoran: Excuse me. I make the same objection because his answer may or may not is in the same tenor as your Honor's objection to prior questions where the witness says maybe, possibly.

The Court's inconsistent ruling follows at page 314:

> Mr. Corcoran: But I would like to have a ruling on the question on the bottom of the—
> The Court: No. That is a practice of the firm. The objection is overruled.

The Court repeated the unusual ruling of exclusion where the answer was that the witness did not recall the order being made for a certain capacity for the R-5 and on objection to Mr. Campbell's question was overruled (312, 313).

POINT IV

The responsibilities and liabilities of carrier and ship require that the ship be made seaworthy.

Section 1303 of the Carriage of Goods by Sea, 46 USC §1302 spell out the duties of the carrier and shipowner in great detail. Congress in enacting this federal law pertaining to the maritime industry had a wealth of knowledge and history going back to sailship days. The object

was to safeguard the members of the crew that carried in the vessel. Among these duties are:

(1) The carrier shall be bound, before and at the beginning of the voyage to exercise due diligence to

(a) make the ship seaworthy;

(b) properly man, equip and supply the ship;

(c) make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

CARGO

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

POINT V

Ship owners have absolute duty to furnish vessels reasonably fit for their intended uses.

In order to recover on a breach of seaworthiness, it is essential that the vessel be unseaworthy with respect to the instrument whereby injuries were occasioned.

> *Bruszewsk* v. *Isthmian S S Co.*, D.C. Pa. 1946, 66 F. Supp. 210 aff'd 163 F2d 720 Cert. Den. 68 S.Ct. 451, 333 U.S. 828.

In the case at bar, the Rudolph vessel "R-5" was unseaworthy in two major respects,

(1) It failed to provide a sufficient complement of crew to assist the plaintiff in changing over the 2 Part Block to a 4 Part block, weighing 1,000 pounds;

(2) The "R-5" and the vessel's owner and operator, the Defendants Rudolph, failed to furnish the Plaintiff with a tag line to be attached to the 4 part block, as it was being lowered to the Pier. Once the 4 Part block, came to rest on the Pier, the weight of 1,000 pounds would make it impossible to reel the cables through it, if it was resting improperly.

POINT VI

Admiralty-maritime jurisdiction is conferred on the continuing S.S. Yamawaka Maru's loading container operation of the floating crane vessel "R-5".

While the accident to the Plaintiff took place on November 14, 1970 at about 8:15 A.M. on the dock bulkhead and in the immediate vicinity of the excessively heavy container cargo to be loaded via the floating crane "R-5", nevertheless the occurrence actually took place in the midst of the S.S. YAMAWAKA MARU's loading container cargo operation. This is particularly true for on the day before the accident the "R-5" had been loading the S.S. YAMAWAKA MARU.

This continuing loading operation, of course, is supported by the testimony of the I.T.O. Pier Superintendent "Joe Chuck" who castigated the Plaintiff for not doing the job of changing over the 4 part block on the day previous, when he charged the Plaintiff with hanging around doing nothing. The Supreme Court has held such course of work to be of an admiralty-maritime character. See the case of

Guitierz v. *Waterman S.S.*, 373 U.S. 206.

By his work of participating in the loading of the S.S. YAMAWAKA MARU, the Plaintiff McSweeney was engaged

in work formerly done by members of the ship's crew in the sailing ship days. See *Sea Shipping Co.* v. *Sieracki,* 328 U.S. 85; *Alaska Steamship Co., Inc.* v. *Petterson,* 347 U.S. 396; *Mahnich* v. *Southern Steamship Co.,* 321 U.S. 96; *Atlantic Transport Co. of W. Va.* v. *Imbrover,* 234 U.S. 52; *International Stevedoring Co.* v. *Haverty,* 272 U.S. 50.

The Court is respectfully referred to the case of *Bill Law* v. *Victory Carriers, et al.,* reported in 1970 A.M.C. No. 2 Feb. Issue (Page 259-516) at Page 397, et seq.; *Reed* v. *Yaka,* 373 U.S. 410, 83 S.Ct. 1349.

In support of Plaintiff's position the cargo loading operations were continuous desptie the ashore-tort committed while on or during loading operations. See *Guitierz* v. *Waterman S.S., supra.*

In addition to his duties as a fireman-oiler, Mr. McSweeney's duties required him to handle vessel's lines during its docking and undocking operation at the times the "R-5" was about to be towed approximately 75 feet to the starboard side of the S.S. YAMAWAKA MARU, to enable the "R-5" crane to lift and load the container cargo from its deck to and aboard the S.S. YAMAWAKA MARU in accordance with the ship's cargo-Lay-Out-Stowage plan and requirements.

This operation also would be an essential area of supervisory competence for the ship's First Mate or Chief Officer. It would also tie in with the ship owner's responsibility re the 50 ton container cargo and related foreseeability of inadequacy of the "R-5" gear of 2 part block to handle the same. This would set in operation the ship's overall obligation and responsibility to Mr. McSweeney, namely the extension of the doctrine of seaworthiness.

In addition to the above, Mr. McSweeney was required to do other seamen's work on and about the "R-5" such

as assist in keeping the "R-5" from injuring the starboard side of the S.S. YAMAWAKA MARU during actual cargo lifting and for him to signal and guide the tow of the "R-5" and hang out night lamps.

By performing and by being obligated to perform these duties, the Plaintiff was entitled to claim the benefits of the Jones Act against his employer, the M. J. Rudolph Corp. (46 U.S.C. 688). In the foregoing circumstances, Mr. McSweeney could justifiably make claim against M. J. Rudolph Corp. under the Jones Act,

(a) for negligence;

(b) for failure to furnish a reasonably safe place to work;

(c) for unseaworthiness of the "R-5" causally related to the accident of 11/14/70.

The Plaintiff is entitled to make claim against the Defendant I.T.O. under the General Maritime Law for contributing neglect. Further, he is entitled to claim the owner chartered operator of the S.S. YAMAWAKA MARU under the extension of seaworthy benefits, i.e., unsafe place to work and the Chief Mate's callous disregard of the Plaintiff's safety when knowingly, he took no means and measures to adequately provide proper loading gear to accommodate the excessively heavy container cargo.

The Plaintiff was a member of the crew of the "R-5" performing duties of loading the vessel S.S. YAMAWAKA MARU and performing other sea duties such as handling the lines, signalling, tieing up the vessel, placing night lamps on the vessel, etc. See *Norton* v. *Warner,* 321 U.S. 566; *Grimes* v. *Raymond Concrete Pile Co.,* 356 U.S. 252. The Court held the Petitioner being transferred at sea from a tug to the "Texas Tower" secured to the bed of the ocean at its ultimate location as a radar warning

station, was covered under the Jones Act. Such remedy was saved to a member of the crew by 52 U.S.C., Section 1654 (Page 253).

POINT VII

The "R-5" was an extension of the lifting apparatus of the S.S. Yamawaka Maru and thus the defendant Yamashita Shinnihon Line as owner, owed the duty of a safe place to work to the Plaintiff under the General Maritime Law and under the Doctrine of Seaworthiness.

The Defendant, Yamashita Shinnihon Line, may argue that the duties which it may have owed to longshoremen arose out of contract insofar as the seaworthiness of the vessel was owed to the Plaintiff. Bearing in mind the theory of the plaintiff that the "R-5" was an extension of the lifting apparatus of the YAMAWAKA MARU (which could only hoist three tons with its own gear and winches), this argument that the contract between the ship and the Defendant ITO did not apply to McSweeney, is without force, as the Supreme Court said in the case of *Sea Shipping Co.* v. *Sieracki,* 328 U.S. 85,

> "* * * seaworthiness is a species of liability without fault which the performing of ships' services imposes * * * limited neither by conceptions of negligence nor contractual in character. It is a form of absolute duty owing to all within the range of its humanitarian policy * * * this policy is not confined to seamen who perform the ship's service under immediate hire of the owner, but extends to those who render it with consent or by his arrangement * * * the ship's owner should not be able to nullify it by parcelling out its operations to in-

> termediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection * * *."

In the case of *Petterson* v. *Alaska,* 347 U.S. 396 (1953) rejected the previously existing rule that when the owner surrenders control of any part of his ship to a stevedore in charge of loading or unloading, his duty of seaworthiness as to that part of surrendered extends only up to the time the stevedore assumes control. If thereafter, the agents of the stevedore while he is in control creates an unsafe condition where none existed before, the ship owner is not liable for resulting accidents. This "surrender of control" defense is exactly what the defendants answer allege and attempt to revive in the case at bar involving the Plaintiff McSweeney. However, the Supreme Court held that the duty to furnish a seaworthy vessel is a non-delegable one * * * it imposes upon the shipowner a liability now dependent upon fault * * *.

In the case of *Pope & Talbor Inc.* v. *Hawn,* 1953, 346 U.S. 406, the protection of seaworthiness was extended to a shoreside carpenter employed by a private contractor. Some lower courts have extended the doctrine to Harborworkers. See *Christensen* v. *U.S.,* U.S. 94 Fed. Supp. 934, affirmed 192 Fed. 2d 199.

In the case of *Daniel* v. *Skibs A/S Hilda Knudson,* 253 Fed. Supp. 758 (1966) where the District Court for the Eastern District of Pennsylvania held that longshoremen engaged in the service of a vessel are entitled to benefits of warranty of seaworthiness. At page 760 the Court held "the longshoremen who are working in the hold hooking on to cargo or the longshoremen working on deck guiding it or operating the cargo winches pose no real problem. Nor is there any longer a problem where a

longshoreman, a member of the same gang working aboard ship, is incidentally on shore doing a job that is part of an unbroken sequence of getting the cargo from ship to shore.

At Page 761, the Court stated the test is "status" not "situs".

In the McSweeney case he was doing work referrable to the mission of loading the YAMAWAKA MARU in a sequence of movement, unbroken by any act of the consignee (P. 761) when he was assisting in changing the block of the R-5. The cargo or appliance had not left the hands of the ship and of those to whom the ship had delegated its work of unloading, the longshoremen (P. 762).

POINT VIII

The failure of the Court to charge as requested that the failure of the Defendants to call the doctors who examined the Plaintiff, namely Dr. Balanzweig and Dr. Moldaver, each of whom had an office in Manhattan and who examined the Plaintiff for his injuries following his accident of November 14, 1970 will permit the jury to infer that their testimony, if given, would not be inconsistent with the findings of Dr. Cook and Dr. Gudelis was error.

In the above request it was pointed that the Plaintiff had been examined by two physicians on behalf of the defendants and they were not called as witnesses. The Court rejected the request and declined to give it. This error was compounded by the fact that the Court read the letters of both doctors which were not evidence, By reading the said letters the contention was made that the Court was substituting its judgment for that of the jury (p. 471, 472).

CONCLUSION

The Plaintiff respectfully prays that the judgment dated March 26, 1976 be reversed and that a new trial be ordered for all of the reasons and in the interest of justice.

CORCORAN AND BRADY
Attorneys for Plaintiff-Appellant

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

The Unoted Sta tes Court of Appeals for the Second circuit

Micha el Mc Sweeney
vs
M.J. Rudolph et al

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

Bernard S. Greenberg being duly sworn, deposes and says that he is over the age of 21 years and resides at 162 E. 7th st,NY,NY

That on the 6th day of July,1976 , he served the annexed appendix a nd brief of the pla intiffp-appellant upon

1. D'Ama to, Costello & She a, attorneys f r the defendant-appellees M.J. Rudolph Co,Inc., and M.J Rudolph, 116 John street,NY,NY

2. ,Se mel ,, McLa ughlin & Boeckmann, attorneys for the de fendant-appellee Internationsl Te rminal Ope rating co, inc., 10 Rocke fe ller pla za ,NY,NY

3 . Kirlin, Campbe ll & Keating, attorneys for the Defenda nt-appellee Yamashita Shinnihon Line, 120 Broadwa y, NY,NY

in this action, by delivering to and leaving with said attorneys two copies of the Appendix and three of the brief true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 6th day of July, 1976, 1975

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Bernard L. Hershey